

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JEREMIAH L. HOKE,

Plaintiff,

v.

CAROLYN W. COLVIN,

Defendant.

NO: CV-13-124-FVS

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 16 and 21. This matter was submitted for consideration without oral argument. Plaintiff was represented by Dana C. Madsen. Defendant was represented by Thomas M. Elsberry. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the court grants Plaintiff's Motion for Summary Judgment and denies Defendant's Motion for Summary Judgment.

**JURISDICTION**

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT 1

1 Plaintiff Jeremiah L. Hoke protectively filed for disability insurance benefits  
2 on December 19, 2007 (Tr. 264-265), and supplemental security income (“SSI”)  
3 on December 20, 2007 (Tr. 266-268). Plaintiff initially alleged an onset date of  
4 June 4, 2004 (Tr. 264, 266), but later amended the onset date to June 1, 2006 (Tr.  
5 281). Benefits were denied initially and upon reconsideration. Tr. 156-159, 162-  
6 165. Plaintiff requested a hearing before an administrative law judge (“ALJ”),  
7 which was held before ALJ R.S. Chester on July 8, 2009. Tr. 43-81. Plaintiff was  
8 not represented by counsel and he testified at the hearing. Tr. 52-70. The ALJ  
9 denied benefits (Tr. 132-146), but the Appeals Council remanded the case and  
10 directed the ALJ to consider the evidence de novo and conduct a new hearing (Tr.  
11 151-154). This hearing was held before ALJ Moira Ausems on September 27,  
12 2011. Tr. 82-127. Plaintiff was represented by counsel and testified at the hearing.  
13 Tr. 93-115. Medical expert Anne E. Winkler, M.D. (Tr. 88-92), and vocational  
14 expert Daniel R. McKinney (Tr. 115-126) also testified. The ALJ denied benefits  
15 (Tr. 20-36) and the Appeals Council denied review (Tr. 1). The matter is now  
16 before this court pursuant to 42 U.S.C. § 405(g).

### 17 **STATEMENT OF FACTS**

18 The facts of the case are set forth in the administrative hearing and  
19 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner,  
20 and will therefore only be summarized here.

1 Plaintiff was 28 years old at the time of the hearing. He completed eleventh  
2 grade. Tr. 117. Plaintiff's employment history includes work as a cook,  
3 dishwasher, customer assistance representative, janitor, and flagger/road  
4 maintenance worker. Tr. 59-65. Most recently, Plaintiff was employed as a cook at  
5 a fast food restaurant. Tr. 93. Plaintiff complains of constant pain in his mid and  
6 low back and shoulder; which he testifies prevents him from lifting, climbing  
7 stairs, walking more than a block at one time, standing for more than five minutes.  
8 Tr. 95-99. He also reported stomach pain two to three times a week at least; and  
9 diarrhea two to five times a week which requires him to go to the bathroom five to  
10 thirty times a day. Tr. 99-104. Plaintiff testified that he previously received  
11 counseling for depression and anxiety. Tr. 104-106.

## 12 STANDARD OF REVIEW

13 A district court's review of a final decision of the Commissioner of Social  
14 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
15 limited: the Commissioner's decision will be disturbed "only if it is not supported  
16 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
17 1158–59 (9th Cir.2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means  
18 relevant evidence that "a reasonable mind might accept as adequate to support a  
19 conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently,  
20 substantial evidence equates to "more than a mere scintilla[,] but less than a

1 preponderance.” *Id.* (quotation and citation omitted). In determining whether this  
2 standard has been satisfied, a reviewing court must consider the entire record as a  
3 whole rather than searching for supporting evidence in isolation. *Id.*

4 In reviewing a denial of benefits, a district court may not substitute its  
5 judgment for that of the Commissioner. If the evidence in the record “is susceptible  
6 to more than one rational interpretation, [the court] must uphold the ALJ's findings  
7 if they are supported by inferences reasonably drawn from the record.” *Molina v.*  
8 *Astrue*, 674 F.3d 1104, 1111 (9th Cir.2012). Further, a district court “may not  
9 reverse an ALJ's decision on account of an error that is harmless.” *Id.* at 1111. An  
10 error is harmless “where it is inconsequential to the [ALJ's] ultimate nondisability  
11 determination.” *Id.* at 1115 (quotation and citation omitted). The party appealing  
12 the ALJ's decision generally bears the burden of establishing that it was harmed.  
13 *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

#### 14 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

15 A claimant must satisfy two conditions to be considered “disabled” within  
16 the meaning of the Social Security Act. First, the claimant must be “unable to  
17 engage in any substantial gainful activity by reason of any medically determinable  
18 physical or mental impairment which can be expected to result in death or which  
19 has lasted or can be expected to last for a continuous period of not less than twelve  
20 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be

1 “of such severity that he is not only unable to do his previous work[,] but cannot,  
2 considering his age, education, and work experience, engage in any other kind of  
3 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
4 1382c(a)(3)(B).

5 The Commissioner has established a five-step sequential analysis to  
6 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
7 404.1520(a)(4)(i)-(v); 416.920(a)(4) (i)-(v). At step one, the Commissioner  
8 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);  
9 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
10 Commissioner must find that the claimant is not disabled. 20 C.F.R. § §  
11 404.1520(b); 416.920(b).

12 If the claimant is not engaged in substantial gainful activities, the analysis  
13 proceeds to step two. At this step, the Commissioner considers the severity of the  
14 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the  
15 claimant suffers from “any impairment or combination of impairments which  
16 significantly limits [his or her] physical or mental ability to do basic work  
17 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);  
18 416.920(c). If the claimant's impairment does not satisfy this severity threshold,  
19 however, the Commissioner must find that the claimant is not disabled. *Id.*

1 At step three, the Commissioner compares the claimant's impairment to  
2 several impairments recognized by the Commissioner to be so severe as to  
3 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§  
4 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more  
5 severe than one of the enumerated impairments, the Commissioner must find the  
6 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

7 If the severity of the claimant's impairment does meet or exceed the severity  
8 of the enumerated impairments, the Commissioner must pause to assess the  
9 claimant's "residual functional capacity." Residual functional capacity ("RFC"),  
10 defined generally as the claimant's ability to perform physical and mental work  
11 activities on a sustained basis despite his or her limitations (20 C.F.R. §§  
12 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the  
13 analysis.

14 At step four, the Commissioner considers whether, in view of the claimant's  
15 RFC, the claimant is capable of performing work that he or she has performed in  
16 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).  
17 If the claimant is capable of performing past relevant work, the Commissioner  
18 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).  
19 If the claimant is incapable of performing such work, the analysis proceeds to step  
20 five.

1 At step five, the Commissioner considers whether, in view of the claimant's  
2 RFC, the claimant is capable of performing other work in the national economy. 20  
3 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination, the  
4 Commissioner must also consider vocational factors such as the claimant's age,  
5 education and work experience. *Id.* If the claimant is capable of adjusting to other  
6 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
7 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other  
8 work, the analysis concludes with a finding that the claimant is disabled and is  
9 therefore entitled to benefits. *Id.*

10 The claimant bears the burden of proof at steps one through four above.  
11 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir.2010). If  
12 the analysis proceeds to step five, the burden shifts to the Commissioner to  
13 establish that (1) the claimant is capable of performing other work; and (2) such  
14 work “exists in significant numbers in the national economy.” 20 C.F.R. §§  
15 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

#### 16 ALJ’S FINDINGS

17 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
18 activity since June 1, 2006, the alleged onset date. Tr. 25. At step two, the ALJ  
19 found Plaintiff has the following severe impairments: lumbar and thoracic  
20 degenerative disc disease with lumbar form of Scheuermann’s, morbid obesity,

1 irritable bowel syndrome, dysthymia, and pain disorder associated with both  
2 psychological factors and general medical condition. Tr. 26. At step three, the ALJ  
3 found that Plaintiff does not have an impairment or combination of impairments  
4 that meet or medically equals the severity of one of the listed impairments in 20  
5 C.F.R. Part 404, Subpt. P, App'x 1. Tr. 27. The ALJ then determined that Plaintiff  
6 had the RFC

7 to perform light work as defined in 20 C.F.R. § 404.1567(b) and §  
8 416.967(b) except no standing/walking for more than two hours during an 8-  
9 hour workday; no more than occasional participation in postural activities;  
10 no climbing ladders/ropes/scaffolds; no more than occasional bilateral  
11 overhead reaching; and the avoidance of concentrated exposure to hazards.  
12 Additionally, the claimant's [RFC] includes the need for ready access to the  
13 bathroom; the need to avoid a concentrated exposure to extreme heat and  
14 humidity; and an inability to perform more than semi-skilled (SVP 4) tasks  
15 due to deficits of concentration, persistence, and pace associated with his  
16 mental impairments and perceptions of pain.

17 Tr. 29. At step four, the ALJ found Plaintiff is unable to perform any past relevant  
18 work. Tr. 34. At step five, the ALJ found that considering the Plaintiff's age,  
19 education, work experience, and RFC, there are jobs that exist in significant  
20 numbers in the national economy that Plaintiff can perform. Tr. 35.

### ISSUES

The question is whether the ALJ's decision is supported by substantial  
evidence and free of legal error. Specifically, Plaintiff asserts: (1) the ALJ did not  
properly consider Plaintiff's testimony regarding his symptoms and limitations;  
and (2) the ALJ did not properly consider nor reject the opinions of Dr. Scott



1 Mabee and Dr. John Arnold. ECF No. 16 at 9-11; ECF No. 23 at 1-7. Defendant  
 2 argues: (1) the ALJ's credibility finding was supported by substantial evidence;  
 3 and (2) the ALJ properly rejected the opinions of Dr. Mabee and Dr. Arnold. ECF  
 4 No. 21 at 2-7.

## 5 DISCUSSION

### 6 A. Credibility

7 In social security proceedings, a claimant must prove the existence of  
 8 physical or mental impairment with "medical evidence consisting of signs,  
 9 symptoms, and laboratory findings." 20 C.F.R. §§ 416.908; 416.927. A claimant's  
 10 statements about his or her symptoms alone will not suffice. *Id.* Once an  
 11 impairment has been proven to exist, the claimant need not offer further medical  
 12 evidence to substantiate the alleged severity of his or her symptoms. *Bunnell v.*  
 13 *Sullivan*, 947 F.2d 341, 345 (9th Cir.1991) (en banc). As long as the impairment  
 14 "could reasonably be expected to produce [the] symptoms," the claimant may offer  
 15 a subjective evaluation as to the severity of the impairment. *Id.* This rule  
 16 recognizes that the severity of a claimant's symptoms "cannot be objectively  
 17 verified or measured." *Id.* at 347 (quotation and citation omitted).

18 If an ALJ finds the claimant's subjective assessment unreliable, "the ALJ  
 19 must make a credibility determination with findings sufficiently specific to permit  
 20 [a reviewing] court to conclude that the ALJ did not arbitrarily discredit claimant's  
 testimony." *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.2002). In making this

1 determination, the ALJ may consider, *inter alia*: (1) the claimant's reputation for  
2 truthfulness; (2) inconsistencies in the claimant's testimony or between his  
3 testimony and his conduct; (3) the claimant's daily living activities; (4) the  
4 claimant's work record; and (5) testimony from physicians or third parties  
5 concerning the nature, severity, and effect of the claimant's condition. *Id.* Absent  
6 any evidence of malingering, the ALJ's reasons for discrediting the claimant's  
7 testimony must be "specific, clear and convincing." *Chaudhry v. Astrue*, 688 F.3d  
8 661, 672 (9th Cir.2012) (quotation and citation omitted).

9       The ALJ did not identify any evidence of malingering. Plaintiff argues the  
10 ALJ improperly rejected Plaintiff's testimony regarding his limitations. ECF No.  
11 16 at 10. Plaintiff testified that he had pain in his back and shoulder that limit his  
12 ability to walk, bend, lift and carry. Tr. 95-98. He testified that he has pain in his  
13 stomach two to three times a week; and has diarrhea two to five times a week that  
14 causes him to go to the bathroom anywhere from five to thirty times a day. Tr. 99-  
15 104. Plaintiff additionally testified that he was in counseling for depression and  
16 anxiety, although not at the time of the hearing, and his medication "kept it so [he  
17 didn't] want to kill [himself]." Tr. 104-105. The ALJ "did not find all of the  
18 [Plaintiff's] symptom allegations to be credible" and Plaintiff's "subjective  
19 statements of record regarding his symptoms and limitations are found to be  
20 supported by the weight of the evidence only to the extent consistent with the

1 assessment of residual functional capacity in this decision.” Tr. 30. The ALJ listed  
2 multiple reasons in support of this adverse credibility finding.

3 First, the ALJ found objective medical findings did not support “the degree  
4 of limitation alleged” by Plaintiff. Tr. 30. Subjective testimony cannot be rejected  
5 *solely* because it is not corroborated by objective medical findings, but medical  
6 evidence is a relevant factor in determining the severity of a claimant’s  
7 impairments. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001)(emphasis  
8 added). Regarding his mental status, as identified by the ALJ, records from 2007  
9 repeatedly describe Plaintiff as alert and oriented with intact memory, appropriate  
10 mood and congruent affect. Tr. 381, 386, 388. Plaintiff also reported that he did not  
11 feel depressed. Tr. 398. In 2008 and 2009 records describe Plaintiff as having  
12 intact insight and judgment, full orientation, intact memory; and often report no  
13 depression, anxiety or agitation. Tr. 621, 624, 627, 630, 641, 645-46, 651, 662,  
14 666, 678-79, 682, 685, 689, 698. In November 2008 and June 2009 Plaintiff’s  
15 score on a mini mental status exam was 30 out of a possible thirty; he was able to  
16 spell “world” backward and forward, obey simple commands, recall 3 out of 3  
17 objects on short delayed memory, and earn normal range score in Trail making  
18 tests A and B. Tr. 753, 765. The court acknowledges objective evidence in the  
19 record indicating that Plaintiff did have severe mental limitations as reflected by  
20 the ALJ’s findings at step two and the assessed RFC (See Tr. 433, 634, 658, 670,

1 693; however, it was valid to reason that the objective findings listed above did not  
2 corroborate “the degree of limitation” claimed by Plaintiff.

3 As to the physical limitations alleged by Plaintiff, the ALJ found the  
4 objective findings “unimpressive when compared with the [Plaintiff’s] allegations  
5 of disability.” Tr. 30. A MRI on July 2, 2008 showed only mild degenerative disc  
6 disease and end plate irregularities consistent with a lumbar form of  
7 Scheuermann’s disease, but no evidence of stenosis or signs of neural compression.  
8 Tr. 599. In April 2008 and July 2009 MRIs of the lumbar spine showed moderate  
9 L5-S1 degenerative disc disease with mild degenerative changes at other lumbar  
10 levels and findings consistent with Scheuermann’s disease. Tr. 590, 593. Further  
11 testing in July 2009 also revealed a radiographically unremarkable left hip and a  
12 normal thoracic SPECT bone scan. Tr. 591, 596. A CT scan of Plaintiff’s  
13 abdomen and pelvis in October 2007 revealed “[n]o significant abnormal findings”  
14 and “[n]o change from the four prior CT scans.” Tr. 452-53. This objective  
15 medical evidence was relevant and properly considered by the ALJ, as it did not  
16 form the sole basis for her adverse credibility finding.

17 As noted by the parties, the ALJ also found that Plaintiff’s “exaggeration of  
18 symptoms undercuts any credibility.” Tr. 31. Exaggeration of symptoms is a  
19 specific and convincing reason to discredit a claimant’s testimony. *See Tonapetyan*  
20 *v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). In support of her reasoning, the

1 ALJ cited a chart notation from 2007 stating Plaintiff had tenderness “which seems  
2 extreme, that is, even with the lightest palpation, the patient winces.” Tr. 410.  
3 Plaintiff argues that this notation does not suggest an exaggeration of symptoms  
4 because objective findings at the same visit indicated some “discomfort,” and  
5 Plaintiff was subsequently issued a prescription for pain medication by the same  
6 emergency room doctor. ECF No. 23 at 1-2 (*citing* Tr. 410). However, a plain  
7 reading of this chart notation could reasonably be interpreted to suggest  
8 exaggeration. “[W]here evidence is susceptible to more than one rational  
9 interpretation, it is the [Commissioner’s] conclusion that must be upheld.” *Burch v.*  
10 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *see also Andrews v. Shalala*, 53 F.3d  
11 1035, 1039 (9th Cir. 1995)(“[t]he ALJ is responsible for determining credibility”).  
12 Moreover, the record contains additional evidence of exaggeration of symptoms by  
13 the Plaintiff. In 2007 an emergency room doctor noted “I do not think his diarrhea  
14 is as bad as he is complaining, of, as his lytes are normal and he has not had any  
15 here in the ED, and he has been here for some time.” Tr. 473. In 2008 the record  
16 includes evidence that Plaintiff’s “thoracic spine is tender with light palpation.  
17 Seems to be an exaggerated response.” Tr. 658.

18 In addition, the ALJ cited a PAI test conducted in April 2007 that was  
19 deemed “questionably valid” and found “several suggestions that the client tried to  
20 portray himself in a negative or pathological manner in particular areas. He

1 presents with certain patterns or combination of features that are unusual or  
2 atypical in clinical populations but relatively common among individuals feigning  
3 mental disorder. Therefore any interpretation should be made with caution.” Tr.  
4 431. A “clinical interpretive report” by Dr. Leslie C. Morey expressed a similar  
5 “concern about distortion of the clinical picture” due to “subtle suggestions that the  
6 client attempted to portray himself in a negative manner.” Tr. 822. Plaintiff  
7 contends that the PAI merely “suggested” negative portrayal and “what is unusual  
8 or atypical of an unknown specific area is not a positive indication of  
9 exaggeration.” ECF No. 23 at 2-3. However, the precise meaning of the language  
10 used in these opinions is susceptible to more than one reasonable interpretation,  
11 and therefore the ALJ’s reasoning is free of error. *Burch*, 400 F.3d at 679.  
12 Exaggeration of symptoms was a specific and convincing reason to discount  
13 Plaintiff’s credibility, and it was supported by substantial evidence.

14       Significantly, while not identified by either party, the ALJ offered additional  
15 valid reasons for discounting Plaintiff’s credibility. *See Carmickle v. Comm’r of*  
16 *Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (court may decline to  
17 address this issue as it was not raised with specificity in Plaintiff’s briefing). First,  
18 the ALJ found that Plaintiff “has a pattern of disinterest in working toward  
19 improvement of his allegedly disabling impairments.” Tr. 31. Unexplained, or  
20 inadequately explained, failure to seek treatment or follow a prescribed course of

1 treatment may be the basis for an adverse credibility finding unless there is a  
2 showing of a good reason for the failure. *Orn v. Astrue*, 495 F.3d 625, 638 (9th  
3 Cir. 2007). However, an ALJ “must not draw any inferences about an individual’s  
4 symptoms and their functional effects from a failure to seek or pursue regular  
5 medical treatment without first considering any explanations that the individual  
6 may provide, or other information in the case record, that may explain infrequent  
7 or irregular medical visits or failure to seek medical treatment.” Social Security  
8 Ruling (“SSR”) 96-7p at \*7 (July 2, 1996), available at 1996 WL 374186. This  
9 issue was not discussed at the hearing, and Plaintiff’s briefing offers no  
10 explanation for his failure to pursue treatment. A review of the record shows that  
11 Plaintiff indicated that he did not have insurance, and could not afford treatment in  
12 2004. Tr. 390, 395. However, evidence cited by the ALJ indicated Plaintiff failed  
13 to seek treatment at least three years later; and these records did not reflect any  
14 documented inability to afford treatment.

15 In January 2007, Plaintiff complained of shoulder pain but failed to follow  
16 up with an “ortho” and instead “[w]aited to see if shoulder [would] heal on its  
17 own.” Tr. 385. In July 2007, a “physical therapy discharge summary” indicated  
18 that Plaintiff initially had “excellent potential to progress with physical therapy.”  
19 Tr. 420. However, he scheduled “many” appointments and did not show up, nor  
20 did he return phone calls. Tr. 420. Therefore, he was discharged from physical

1 therapy services until such time as he “was willing to participate with physical  
2 therapy on a regular basis.” Tr. 420. This record mentions that Plaintiff did not  
3 pursue physical therapy *previous to* his evaluation in June 2007 because he did not  
4 have insurance at that time. Tr. 420. In June 2009, Plaintiff reported he was  
5 accepted as a client at Seattle Mental Health but “chose not to make the effort to  
6 go.” Tr. 764. Plaintiff’s failure to pursue treatment was a specific, legitimate  
7 reason to find him not credible.

8       Next, the ALJ reasoned that Plaintiff’s activities of daily living were  
9 inconsistent with a finding of total disability. Tr. 31. Evidence about daily  
10 activities is properly considered in making a credibility determination. *Fair v.*  
11 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). It is well-settled that a claimant need  
12 not be utterly incapacitated in order to be eligible for benefits. *Id.*; *see also Orn*,  
13 495 F.3d at 639 (“the mere fact that a plaintiff has carried on certain  
14 activities...does not in any way detract from her credibility as to her overall  
15 disability.”). However, even where activities “suggest some difficulty functioning,  
16 they may be grounds for discrediting the [Plaintiff’s] testimony to the extent that  
17 they contradict claims of a totally debilitating impairment.” *Molina v. Astrue*, 674  
18 F.3d 1104, 1113 (9th Cir. 2012).

19       As noted by the ALJ, in January 2007 Plaintiff reported exercising two to  
20 three times a week by walking his dogs. Tr. 385. Plaintiff has no difficulty with



1 regular self-care, helps with chores, hangs out with friends, “drives around” and  
2 drives his girlfriend to work, plays on the computer, watches television, and plays  
3 with remote control cars. Tr. 106, 430, 547, 765-66, 827. Additionally, Plaintiff  
4 reported he would ride his four-wheeler around the yard “throughout the day” (Tr.  
5 430); and in 2007 he presented at the emergency room because he “fell off his four  
6 wheeler.” Tr. 485. In 2008 Plaintiff reported that he “works on cars when he can.”  
7 Tr. 657. The ALJ found Plaintiff’s “physical activity is inconsistent with his  
8 complaints of disabling pain.” Tr. 31. Tr. 26-27. It is noted that Plaintiff’s  
9 testimony about helping with chores is moderated by how he feels at the time; and  
10 while he mentions hanging out with friends it is not “like it used to be.” Tr. 103-  
11 104, 109-111. However, while evidence of Plaintiff’s daily activities may be  
12 interpreted more favorably to the Plaintiff, “where evidence is susceptible to more  
13 than one rational interpretation, it is the [Commissioner’s] conclusion that must be  
14 upheld.” *Burch*, 400 F.3d at 679. Moreover, any error by the ALJ in considering  
15 Plaintiff’s daily activities when making her adverse credibility finding is harmless  
16 because, as discussed above, the ALJ’s remaining reasoning and ultimate  
17 credibility finding is adequately supported by substantial evidence. *See Carmickle*,  
18 533 F.3d at 1162-63. Thus, the ALJ reasonably considered Plaintiff’s daily  
19 activities in finding Plaintiff not credible.

1 For all of these reasons, and having thoroughly reviewed the record, the  
2 court concludes that the ALJ supported his adverse credibility finding with  
3 specific, clear and convincing reasons supported by substantial evidence.

#### 4 **B. Medical Opinion Evidence**

5 There are three types of physicians: “(1) those who treat the claimant  
6 (treating physicians); (2) those who examine but do not treat the claimant  
7 (examining physicians); and (3) those who neither examine nor treat the claimant  
8 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”  
9 *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir.2001)(citations omitted).

10 Generally, a treating physician's opinion carries more weight than an examining  
11 physician's, and an examining physician's opinion carries more weight than a  
12 reviewing physician's. *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th  
13 Cir.2001)(citations omitted). If a treating or examining physician's opinion is  
14 uncontradicted, the ALJ may reject it only by offering “clear and convincing  
15 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d  
16 1211, 1216 (9th Cir.2005). Conversely, “[i]f a treating or examining doctor's  
17 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by  
18 providing specific and legitimate reasons that are supported by substantial  
19 evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830–831 (9th Cir.1995)).  
20 “However, the ALJ need not accept the opinion of any physician, including a

1 treating physician, if that opinion is brief, conclusory and inadequately supported  
2 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
3 (9th Cir. 2009)(quotation and citation omitted). Plaintiff argues “[t]he ALJ did not  
4 properly consider nor reject” the mental health opinions by Dr. Scott Mabee and  
5 Dr. John Arnold. ECF No. 16 at 10-11; ECF No. 23 at 5-6.

6 **1. Dr. Scott Mabee**

7 In May 2010, examining physician Dr. Mabee opined that Plaintiff had  
8 mostly mild cognitive limitations and a moderate limitation in the ability to  
9 perform routine tasks Tr. 828. However, Dr. Mabee opined marked limitations in  
10 Plaintiff’s ability to relate appropriately to co-workers and supervisors, the ability  
11 to interact appropriately in public contacts, and the ability to maintain appropriate  
12 behavior in a work setting. Tr. 828. Additionally, Dr. Mabee assessed a severe  
13 limitation in Plaintiff’s ability to respond appropriately and tolerate the pressures  
14 and expectations of a normal work setting. Tr. 828. He opined that “[d]ue to the  
15 longevity and chronicity of his issues, it is unlikely that [Plaintiff] would be able to  
16 obtain or maintain employment. Were he to become employed, he would miss  
17 many days due to physical complaints, which would lead to termination.” Tr. 828.

18 The ALJ gave no weight to the opinion of Dr. Mabee because it was  
19 “unaccompanied by objective medical findings in its support. Additionally, the  
20 [Plaintiff’s] ability to maintain employment is a disability issue left to the

1 Commissioner of Social Security Administration.” Tr. 33. Plaintiff correctly argues  
2 the ALJ failed to provide the requisite reasons for rejecting his opinion.<sup>1</sup> First, the  
3 ALJ’s reasoning that Dr. Mabee’s opinion was “unaccompanied by objective  
4 medical findings in its support,” is insufficient, standing alone, to reject his  
5 opinion. It is well-settled in the Ninth Circuit that “[t]o say that medical opinions  
6 are not supported by sufficient objective findings ... does not achieve the level of  
7 specificity our prior cases have required....” *Embrey v. Bowen*, 849 F.2d 418,  
8 421(9th Cir. 1988). Defendant notes that the ALJ may properly reject any opinion  
9 that is brief, conclusory and inadequately supported by clinical findings. *Bayliss*,  
10 427 F.3d at 1216. However, this argument is inapposite because Dr. Mabee’s  
11 evaluation included additional narration, and was accompanied by a detailed  
12 mental status examination and the detailed results of MMPI-2-RF testing. Tr. 825-

---

13 <sup>1</sup> Plaintiff argues that Dr. Mabee and Dr. Arnold’s opinions are “uncontradicted”  
14 and therefore can only be rejected for clear and convincing reasons supported by  
15 substantial evidence. *Bayliss*, 427 F.3d at 1216. However, despite being rejected by  
16 the ALJ, the record includes at least one contradictory opinion by Dr. Eugene  
17 Kester in 2008 which concluded that Plaintiff had only mild functional limitations  
18 in maintaining social functioning. Tr. 528. Thus, the ALJ must provide specific  
19 and legitimate reasons, supported by substantial evidence, for rejecting the  
20 opinions. *Id.*

1 838. This reason is not specific and legitimate, nor is it supported by substantial  
2 evidence.

3 The only additional reason offered by the ALJ for rejecting Dr. Mabee's  
4 opinion is that the ability to maintain employment is a "disability issue left to the  
5 Commissioner." Tr. 33. The regulations are clear that the Commissioner is  
6 "responsible for making the determination or decision about whether you met the  
7 statutory definition of disability .... A statement by a medical source that you are  
8 'disabled' or 'unable to work' does not mean that we will determine that you are  
9 disabled." 20 C.F.R. §§ 404.1527(d), 416.927(d); *see also* §§ 404.1527(e)(3),  
10 416.927(e)(3)("[w]e will not give any special significance to the source of an  
11 opinion on issues reserved to the Commissioner."). Thus, while it was not legal  
12 error for the ALJ to disregard Dr. Mabee's opinion specifically as to Plaintiff's  
13 capacity to maintain employment; this is not a specific and legitimate reason to  
14 reject Dr. Mabee's *medical opinion* regarding Plaintiff's functional limitations. The  
15 ALJ failed to provide specific and legitimate reasons, supported by substantial  
16 evidence, for rejecting Dr. Mabee's opinion.

## 17 **2. Dr. John Arnold**

18 In March 2011, Dr. Arnold opined that Plaintiff had moderate limitations in  
19 his ability to understand, remember, and persist in tasks by following complex  
20 instructions of more than three steps; and the ability to learn new tasks. Tr. 841.

1 Dr. Arnold also opined that Plaintiff had marked limitations in his ability to  
2 communicate and perform effectively in a work setting with public contacts and  
3 his ability to maintain appropriate behavior in a work setting; and moderate  
4 limitations in the ability to communicate and perform effectively in a work setting  
5 with limited public contact. Tr. 841.

6 The ALJ gave no weight to Dr. Arnold's opinion that the claimant needed  
7 minimal contact with other people in a work situation solely because "[t]his  
8 determination is contrary to the other medical reports in the documentary record."  
9 Tr. 33. Plaintiff argues the ALJ "did not identify which medical reports were in  
10 variance to Dr. Arnold's conclusions," and instead relied on the "boilerplate  
11 statement that objective factors do not support the conclusions." ECF No. 23 at 6  
12 (citing *Embrey*, 849 F.2d at 421). The court agrees. Defendant is correct that  
13 consistency with the record as a whole is a factor considered by the ALJ when  
14 weighing a medical opinion. ECF No. 21 at 6-7 (citing 20 C.F.R. §  
15 404.1527(c)(4)). However, in this case the ALJ provided no citation to the record  
16 or specific explanation to support his conclusion that the opinion was contrary to  
17 "other medical reports in the record."

18 Moreover, a cursory review of the record reveals other medical reports that  
19 did, in fact, support Dr. Arnold's conclusion that Plaintiff should have minimal  
20 contact with other people in a work situation. In 2010 Dr. Mabee opined marked

1 limitations in Plaintiff's ability to relate appropriately to co-workers and  
2 supervisors, and the ability to interact appropriately in public contacts. Tr. 828. In  
3 2007 Victoria Carroll, MS opined that Plaintiff had marked limitations in the  
4 ability to respond appropriately to and tolerate the pressures and expectations of a  
5 normal work setting; and moderate limitations in his ability to relate appropriately  
6 with co-workers and supervisors and interact appropriately in public contacts. Tr.  
7 426. In 2008, Shari Lyszkiewicz, MS, opined that Plaintiff had marked limitations  
8 in his ability to relate appropriately to co-workers and supervisors; interact  
9 appropriately in public contacts; and respond appropriately to the pressures and  
10 expectations of a normal work setting. Tr. 758. The ALJ failed to provide specific  
11 and legitimate reasons, supported by substantial evidence, for rejecting Dr.  
12 Arnold's opinion.

### 13 **3. Remand**

14 Although not identified by Plaintiff, the court notes that the ALJ did not  
15 accord controlling or significant weight to any psychological evidence (Tr. 32-34);  
16 nor did the medical expert offer testimony as to Plaintiff's mental limitations (Tr.  
17 91). Thus, the court is unclear as to what evidence the ALJ relied upon when  
18 including mental limitations in Plaintiff RFC "due to deficits of concentration,  
19 persistence, and pace associated with his mental impairments and perceptions of  
20 pain." Tr. 29; *See Bayliss*, 427 F.3d at 1217 (ALJ's RFC determination will be

1 affirmed if the ALJ “applied the proper legal standard and his [or her] decision is  
2 supported by substantial evidence”). Due to the ALJ’s improper rejection of the  
3 psychological opinion evidence discussed above, and ambiguities regarding the  
4 weight assigned to the psychological opinion evidence and the resulting RFC; on  
5 remand the ALJ must reconsider all of the psychological opinion evidence, explain  
6 how findings are supported by substantial evidence, and provide legally sufficient  
7 specific and legitimate reasons for rejecting any psychological opinion. However,  
8 on remand the ALJ is expressly not required to reconsider findings as to the  
9 physical opinion evidence that was not challenged by Plaintiff; nor is the ALJ  
10 required to reconsider the ALJ’s properly supported adverse credibility finding.

### 11 CONCLUSION

12 The ALJ’s decision is not supported by substantial evidence and free of legal  
13 error. On remand, the ALJ must reconsider the psychological opinion evidence  
14 only; and, if necessary, take additional testimony from a medical expert and  
15 vocational expert, and reconsider Plaintiff’s RFC.

### 16 ACCORDINGLY, IT IS HEREBY ORDERED:

17 1. Plaintiff’s Motion for Summary Judgment, ECF No. 16, is **GRANTED**.

18 The matter is remanded to the Commissioner for additional proceedings  
19 pursuant to sentence four 42 U.S.C. § 405(g).

20 2. Defendant’s Motion for Summary Judgment, ECF No. 21, is **DENIED**.



1 The District Court Executive is hereby directed to enter this Order and  
2 provide copies to counsel.

3 **DATED** this 5th of June, 2014.

4 *s /Fred Van Sickle*  
5 Fred Van Sickle  
6 Senior United States District Judge  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20